

Georgia Is a Peach for Insured's Right to Diminished Value

By KATY M. YOUNG*

Introduction

IMAGINE THAT YOU OWN A CAR worth \$15,000; it is in great shape with only minor wear and tear. Now imagine that your car is damaged in a hit-and-run accident, and the driver of the other car is never found. Your car has sustained \$5000 in mostly cosmetic damage. If the damage to the vehicle is more than your deductible, your next move is to submit a claim to your automobile insurance company for coverage. Most insurers would elect to repair your vehicle, because the damage to the car is much less than its fair market value. You take the car to a reputable body shop, they make the necessary repairs, and your insurance company pays the bill after you pay the deductible. If you try to sell that car, you would find that even though the physical repairs were completed, your car is worth less than it was before the accident.¹ If you purchased your car on credit then your loan exceeds the market value of your car. You are now stuck with that car unless you are willing to take a loss or you can find some way to make up the difference. If you re-read your insurance policy, you may come across language that promises to pay you for "all loss to your car," which you may think means that your insurer will help cover the difference between what your car was worth prior to the accident and what it is

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1. See, e.g., *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001); *Campbell v. Markel Am. Ins. Co.*, 822 So. 2d 617, 621 (La. Ct. App. 2001); *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473, 475-77 (La. Ct. App. 2001); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 158, 162 (Tex. 2003).

worth after the accident. If you live in Georgia and your accident occurred after November 28, 2001, you are in luck because automobile insurance providers in Georgia are required to compensate their insureds for that difference. This is known as "diminished value," per the Georgia Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Mabry*.²

If you do not live in Georgia, chances are that your insurer is not required to compensate you for the diminished value of your vehicle. The outcome of litigation on your specific policy is unknown at best. Just over half of the states have considered the issue of liability for diminished value damages at the appellate level.³ While eleven of those states have held insurers liable for such damage,⁴ Georgia is the only state where the law is settled.⁵ In the states where courts have required insurers to pay diminished value damages, the courts take a case-by-case approach that is highly dependent on the facts and circumstances of the litigation before the court, including specific policy provisions.⁶ This Comment argues that because insurance policies are usually contracts of adhesion, where one party has far less bargaining power than the other, courts should find coverage for the insured as a matter of basic contract construction and public policy.

Part I of this Comment will discuss the basic framework that courts use in interpreting insurance contracts. Part II will show how courts have used basic contract interpretation principles to deny coverage for diminished value damages in many jurisdictions. Part III will study the Georgia law, including how the rule came to be, the decision that laid it out, and the aftermath of that decision. Finally, Part IV of this Comment will demonstrate why Georgia has it right, both as a matter of basic contract interpretation and as a matter of public policy.

I. Insurance Contract Interpretation Framework

Insurance policies are contracts where "[t]ypically there is disparity between the bargaining positions of the insurer and the insured."⁷ Such contracts are known as contracts of adhesion, "under which the

2. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114 (Ga. 2001).

3. Thomas O. Farrish, "Diminished Value" in *Automobile Insurance: The Controversy and Its Lessons*, 12 CONN. INS. L.J. 39, 40 (2005).

4. *Id.*

5. *Mabry*, 556 S.E.2d at 122.

6. *See, e.g., Hyden v. Farmers Ins. Exch.*, 20 P.2d 1222, 1224 (Colo. App. 2000).

7. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 963 (1970).

insured is left little choice beyond electing among standardized provisions offered to him.”⁸ In order to guard against some of the harsh or unfair consequences that could come from the unequal bargaining positions, courts have several tools of contract construction at their disposal that can be found in case law and the Restatement (Second) of Contracts. This Comment focuses on three such tools: the doctrine of *contra proferentem*,⁹ the doctrine of reasonable expectations,¹⁰ and the public policy limitation on freedom of contract.¹¹ Courts will only apply *contra proferentem* and the public policy limitation where the insurance policy in question is ambiguous, because “[i]nsurance contracts are to be enforced as they are written, assuming that there are no ambiguities in the provisions at issue.”¹² In contrast, the doctrine of reasonable expectations is not tied to a finding of ambiguity. In many of the diminished value cases, the insured plaintiff had to argue that his or her auto insurance policy was ambiguous in order to take advantage of the tools of contract construction that cut in his or her favor.¹³ The auto insurance policies at issue all contained language strikingly similar to the following:¹⁴

8. *Id.* at 966.

9. If contract language is ambiguous, “the doctrine of *contra proferentem* requires that the language of an insurance policy be construed most strongly against the insurance company that drafted it,” because “[i]t is the obligation of the insurer to state clearly the terms of the policy.” *O’Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001) (quoting *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. Super. Ct. 1997)). “In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.” RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

10. “The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.” *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973) (quoting *Keeton*, *supra* note 7, at 967).

11. “[I]nsurance companies may limit coverage in any manner they desire, so long as the limitations do not conflict with statutory provisions or public policy.” *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473, 477 (La. Ct. App. 2001). “In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.” RESTATEMENT (SECOND) OF CONTRACTS § 207.

12. *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So. 2d 785, 790 (Ala. Civ. App. 2002).

13. See, e.g., *Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222 (Colo. App. 2000); *Allgood v. Meridian Sec. Ins. Co.*, 807 N.E.2d 131 (Ind. Ct. App. 2004).

14. See, e.g., *Pritchett*, 834 So. 2d at 787 (“We will pay for loss to your car caused by collision but only for the amount of each such loss in excess of the deductible amount The limit of our liability for loss to property or any part of it is the lower of: 1. the actual cash value; or 2. the cost of repair or replacement.”); *Hyden*, 20 P.3d at 1224 (“Farmers will pay the loss in money or repair or replace . . . with a vehicle of like kind and quality.”)

We will pay for direct and accidental loss to "your covered auto" . . . minus any applicable deductible Our limit of liability for loss will be the lesser of the: (1) Actual cash value of the stolen or damaged property; or (2) Amount necessary to repair or replace the property with other property of like kind and quality.¹⁵

A contract term is ambiguous if it is susceptible to more than one reasonable meaning.¹⁶ Diminished value plaintiffs have claimed that the word "repair" in their insurance policy is ambiguous because it could mean that the insurance company promises to fix or restore the vehicle,¹⁷ which could implicate "appearance and function" only, or "appearance, function *and* value."¹⁸ The definition of repair differs depending on which dictionary definition a court uses.¹⁹ A leading commentator has stated that "[a] vehicle is not restored to substantially the same condition if repairs leave the market value of the vehicle substantially less than the value immediately before the collision."²⁰ Alternatively, plaintiffs have successfully argued that the "of like kind and quality" language in the limit of liability clause is ambiguous because it "fails to specify the protections afforded by the policy."²¹

A. *Contra Proferentem*, Reasonable Expectations, and Public Policy Limits

Once it is established that a term in a contract is ambiguous by virtue of being susceptible of more than one reasonable meaning, the

(internal quotation marks omitted)); *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114, 118 (Ga. 2001) ("State Farm will pay for loss to your car, minus any deductible. The policy contains a provision limiting State Farm's liability to the lower of the actual cash value of the vehicle or cost of repair or replacement, and a provision giving State Farm the right to settle a loss by paying up to the actual cash value of the car of paying to repair or replace the property or part with like kind and quality." (internal quotation marks omitted)).

15. *Allgood*, 807 N.E.2d at 132.

16. *Hyden*, 20 P.3d at 1224.

17. *See id.* at 1225.

18. *Allgood*, 807 N.E.2d at 136.

19. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1986) defines repair as "restoration to a state of soundness, efficiency, or health." *Id.* at 1923. WEBSTER'S NEW WORLD COLLEGE DICTIONARY (3d ed. 1998) defines repair as "to put back in good condition after damage, decay, etc.; mend, fix." *Id.* at 1137. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1971) defines repair as "to restore to sound condition after damage or injury; fix." *Id.* at 1102.

20. *Hyden*, 20 P.3d at 1225 (quoting LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 175:47 (3d ed. 1998)). "Unless a different intention is manifested, . . . technical terms and words of art are given their technical meaning when used in transaction with their technical field." RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981).

21. *Hyden*, 20 P.3d at 1225.

doctrine of contra proferentem may be applied. Courts that apply the doctrine of contra proferentem choose the meaning of a term that operates against the party that supplied it.²² Contra proferentem is applied more rigorously in insurance adhesion contracts²³ than in other contracts.²⁴ For the average insurance consumer unfamiliar with contract law or the terms of his or her policy, contra proferentem can be strong medicine.

Most people never read or understand their policies.²⁵ A court can strike a term from a standardized contract “[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term.”²⁶ The doctrine of reasonable expectations is more powerful than contra proferentem because the plaintiff need not demonstrate ambiguity in the contract for it to apply. In fact, the objectively reasonable expectations of the insured will apply even though a thorough reading of the policy would have negated the insureds expectations.²⁷ The doctrine allows an insured’s expectations to arise from an extrinsic source, even if the policy is clear.²⁸

The Restatement (Second) of Contracts explicitly employs public policy as a tool of contract construction where a contract or term therein is found to be ambiguous.²⁹ However, a court “will not void an insurance policy provision absent ‘clear indicia’ of a contrary public policy.”³⁰

II. How Basic Contract Principles Have Been Used to Deny Coverage in Some Jurisdictions

First-party insurance claims for the diminution in value of repaired vehicles have been around long before the Georgia Supreme Court’s landmark decision in *Mabry*.³¹ Georgia’s rule that insurers are

22. RESTATEMENT (SECOND) OF CONTRACTS § 206.

23. See Keeton, *supra* note 7, at 966.

24. *Id.* at 969–70.

25. *Id.* at 968. (“Policy forms are long and complicated and cannot be fully understood without detailed study; few policyholders ever read their policies as carefully as would be required for moderately detailed understanding.”).

26. RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

27. Keeton, *supra* note 7, at 967.

28. *Id.*

29. RESTATEMENT (SECOND) OF CONTRACTS § 207 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.”).

30. O’Brien v. Progressive N. Ins. Co., 785 A.2d 281, 286 (Del. 2001).

31. See, e.g., Haussler v. Indem. Co. of Am., 227 Ill. App. 504 (App. Ct. 1923).

obligated to pay diminished value damages grew from a line of precedent that began in 1926.³² At the time the Georgia Supreme Court was preparing to hear the *Mabry* case, Louisiana, Delaware, and Missouri all issued decisions contrary to Georgia's eventual rule in *Mabry*.³³ A study of these cases will show how courts had approached diminished value cases prior to *Mabry*, which will illuminate the sound reasoning of Georgia's rule in Part III.

A. Louisiana Court Holds the Term "Repair" Is Not Ambiguous

On August 22, 2001, the Second Circuit of the Court of Appeal of Louisiana held that "where an insurer has paid for full and adequate physical repair to a damaged vehicle when a first party claim is made, its obligation under the policy is satisfied and it is not required to pay for any reduction in market value of the vehicle."³⁴ This was the first time that a Louisiana appellate court decided the issue of coverage for diminished value damages.³⁵ The trial court determined that the "resolution of whether diminished value is recoverable hinged on the meaning of 'repair.'"³⁶ If repair was found to be ambiguous in the contract, then the doctrine of contra proferentem would operate to construe the policy against the insurer.³⁷ The appellate court agreed and purported to apply basic principles of contract interpretation to find that the policy language was unambiguous, thus "limiting State Farm's liability to repair the vehicle by restoring it to a useful condition or a condition as near as possible to its pre-accident physical condition."³⁸

The plaintiff, Townsend, claimed that State Farm was obligated to pay the diminished value in addition to the repair costs, arguing that the word "loss" in the policy should be defined to include any loss to an insured vehicle, including loss of value.³⁹ He further argued that diminished value is a direct loss to an insured vehicle.⁴⁰ The court did not dispute Townsend's assertions, but without any analysis, found

32. See *U.S. Fid. & Guar. Co. v. Corbett*, 134 S.E. 336 (Ga. Ct. App. 1926) (first claim for diminished value damages in Georgia).

33. *O'Brien*, 785 A.2d 281; *Campbell v. Markel Am. Ins. Co.*, 822 So. 2d 617 (La. Ct. App. 2001); *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473 (La. Ct. App. 2001); *Camden v. State Farm Mut. Auto. Ins. Co.*, 66 S.W.3d 78 (Mo. Ct. App. 2001).

34. *Townsend*, 793 So. 2d at 480.

35. *Id.* at 477.

36. *Id.* at 475.

37. See *id.* at 477.

38. *Id.* at 475.

39. *Id.* at 477.

40. *Id.* at 475.

that such assertions did not resolve the issue.⁴¹ The Court of Appeal agreed with the trial court that the outcome of the litigation “hinged on the meaning of ‘repair,’”⁴² but noted that “[w]ords and phrases used in a policy are to be construed using their plain, ordinary, and generally prevailing meaning, unless the words have acquired a technical meaning.”⁴³ One such technical meaning can be found in the treatise *Couch on Insurance*, but the court made no mention of this definition of repair⁴⁴ probably because the plaintiff’s attorney did not argue for it. Had Townsend’s attorney offered the *Couch on Insurance* definition of repair, the Restatement provision that “[u]nless a different intention is manifested, technical terms and words of art are given their technical meaning when used in transaction with their technical field”⁴⁵ may have operated to allow the court to adopt that definition. The court did not make a direct reference to the doctrine of reasonable expectations, but did mention that “[t]he parties intent, as reflected by the words of the policy, determines the extent of coverage.”⁴⁶

The *Townsend* court’s analysis failed to give credence to the fact that the policy is a contract of adhesion, which probably did not reflect Townsend’s intent at all. In addition, the court gave lip service to the rule that “insurance companies may limit coverage in any manner they desire, so long as the limitations do not conflict with . . . public policy” but failed to apply that principle.⁴⁷ As will be discussed in Part III, the *Mabry* court recognized the principles that the *Townsend* court failed to consider and thus came to the opposite conclusion.

One month after the *Townsend* decision, the Louisiana First Circuit Court of Appeal examined the question of whether a plaintiff’s insurance company was obligated to pay for the diminished value of

41. *Id.* at 477.

42. *Id.* at 475.

43. *Id.* at 476.

44. One definition of repair states:

A vehicle is not restored to substantially the same condition if repairs leave the market value of the vehicle substantially less than the value immediately before the collision. Hence, where the property is repairable but after repair the property does not have the same market value as before the harm was sustained, such additional loss element may be taken into consideration. Thus, it has been held or recognized in a number of cases that an element of damage for which recovery may be had under an automobile collision insurance policy is the difference in value before the collision and after repairs have been made.

Russ & SEGALLA, *supra* note 20, § 175:47.

45. RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981).

46. *Townsend*, 793 So. 2d at 476.

47. *Id.* at 477.

the plaintiff's motorcycle, following adequate repairs.⁴⁸ Plaintiff Campbell's motorcycle was damaged in an accident and he filed a claim with his insurance company for the cost of repair and the diminished value.⁴⁹ Markel, the insurer, paid for the cost of repairs but denied Campbell's claim for the diminished value of the motorcycle.⁵⁰ "Markel [did] not dispute that diminished value is a 'direct and accidental loss' under the terms of its policy."⁵¹ The court agreed that "the insuring language of the policy covering 'direct and accidental loss' is broad enough to encompass diminished value."⁵² The issue then became "whether the limitation of liability is broad enough to cap Markel's obligation to pay it."⁵³ Since the limit of liability section of Campbell's policy did not include the "of like kind and quality" language relied upon by some diminished value plaintiffs to show that the word repair is ambiguous,⁵⁴ the court found "no concept of 'value' in the ordinary meaning of the word 'repair.'"⁵⁵ The court held the policy was not ambiguous and did not violate public policy.⁵⁶ The court also refused to apply *contra proferentem*.⁵⁷

B. Delaware Supreme Court Finds Contract Unambiguous

The Delaware Supreme Court rejected a claim for diminished value damages in *O'Brien v. Progressive Northern Ins. Co.*⁵⁸ The court did not employ the doctrine of *contra proferentem* because it found the contract was unambiguous. The court held this even though the plaintiffs directed the court's attention to some of Progressive's internal documents that supported the claim of ambiguity, and Progressive's policy change to explicitly exclude coverage of diminished value damages after the plaintiffs filed suit.⁵⁹ The court refused to look beyond the four corners of the document for extrinsic evidence of ambiguity, despite the fact that in this particular case, the extrinsic evidence of ambiguity was arguably strong.⁶⁰ The court concluded—without analy-

48. *Campbell v. Markel Am. Ins. Co.*, 822 So. 2d 617, 618–19 (La. Ct. App. 2001).

49. *Id.* at 619.

50. *Id.*

51. *Id.* at 621.

52. *Id.* at 623.

53. *Id.*

54. *Id.* at 628.

55. *Id.* at 627.

56. *Id.*

57. *Id.*

58. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281 (Del. 2001).

59. *Id.* at 288–89.

60. *Id.* at 290.

sis—that “Delaware has no policy interest in the coverage at issue in this case.”⁶¹ Even though the *O’Brien* decision came out less than three weeks before the *Mabry* decision, the Georgia Supreme Court approached the same issue quite differently.⁶²

C. Missouri Court Holds Contract Is Not Ambiguous

Only fifteen days before the *Mabry* decision came out, a Missouri Court of Appeals handed down its decision in *Camden v. State Farm Mutual Automobile Insurance Co.*⁶³ Camden’s car was damaged in an accident. She filed a claim with State Farm for the cost of repairs, which it paid.⁶⁴ Thirteen months later, Camden sold her car as a trade-in.⁶⁵ She was unable to quantify the amount of the diminished value she purportedly suffered, but filed a claim with State Farm for coverage anyway.⁶⁶ The policy language did not include the phrase “of like kind and quality” in the limit of liability clause.⁶⁷ The plaintiff did not point to any specific words as being ambiguous, but rather asked the court to “look at the limit of liability ‘repair or replace’ provisions in conjunction with Insurer’s agreement to cover loss and the policy exclusions.”⁶⁸ The court found that the policy was not ambiguous, so it sought to enforce the policy as written.⁶⁹ Under the court’s reading of the policy, the insurer was only obligated “to pay the lower of ‘actual cash value’ or the cost of repair.”⁷⁰ Most notably, the court adopted the trial court’s finding that “there is no showing that the value of the vehicle following repair or replacement is necessarily inherently diminished.”⁷¹

Even in cases where the court finds for the insurer, courts have acknowledged the reality that a perfectly repaired car is worth less than the same car that was never in an accident.⁷² Faced with the

61. *Id.* at 286.

62. See discussion *infra* Part III.

63. 66 S.W.3d 78 (Mo. Ct. App. 2001).

64. *Id.* at 79–80.

65. *Id.* at 80.

66. *Id.*

67. *Id.* at 79.

68. *Id.* at 81.

69. *Id.*

70. *Id.* at 82.

71. *Id.*

72. See, e.g., *O’Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001); *Campbell v. Markel Am. Ins. Co.*, 822 So. 2d 617, 621 (La. Ct. App. 2001); *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473, 475–77 (La. Ct. App. 2001); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 158, 162 (Tex. 2003). In other instances, courts and insurance companies have accepted the plaintiff’s allegations that repaired vehicles are worth

other recent decisions rejecting an insurer's obligation to cover diminished value damages, the Georgia Supreme Court had its chance to weigh in on the split in other jurisdictions.

III. Georgia's Interpretation of Diminished Value Damages

A. *Mabry's* Precedent

The first time that a Georgia court addressed diminished value damages was in *United States Fidelity & Guaranty Co. v. Corbett* in 1926.⁷³ The plaintiff's car was damaged in an accident, and he filed a claim with the defendant insurer for the diminished value of the vehicle.⁷⁴ The defendant insurance company denied the claim.⁷⁵ The policy language stated that the insurer would cover "actual loss or damage" to the covered automobile and contained the following provisions: "[i]t shall be optional with the company to repair, rebuild, or replace . . . with other of like kind and quality. . . . In any event the company shall be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged and destroyed."⁷⁶ The court started its analysis by stating that "the measure of the insurer's liability will be determined according to the terms of the contract."⁷⁷ Turning to the doctrine of *contra proferentem*, the court noted that "the conditions and provisions of contracts of insurance will be strictly construed against the insurer who prepares such contracts."⁷⁸ Without employing *contra proferentem*, the court went on to reason that

the undertaking of the company to insure the owner against "actual loss or damage" must be taken as the primary obligation, under which the measure of the liability would be the difference between the value of the property immediately before the injury and its value immediately afterwards; and the stipulation that the liability should not exceed the cost of repair or replacement must be construed as a subordinate provision, limiting or abating the primary liability, to be pleaded defensively if the insurer would diminish or limit the amount of recovery by reason thereof.⁷⁹

less than similar automobiles that have not been damaged. See, e.g., *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So. 2d 785, 787 (Ala. Civ. App. 2002).

73. *U.S. Fid. & Guar. Co. v. Corbett*, 134 S.E. 336 (Ga. Ct. App. 1926).

74. *Id.* at 337.

75. *Id.* The court found that the defendant's denial of the claim was against the terms of the contract, which distinguishes the case from the more modern ones discussed in this Comment. See *id.* Nevertheless, this case serves as the doctrinal starting point for how the *Mabry* rule evolved.

76. *Id.*

77. *Id.* at 338.

78. *Id.* (quoting *Johnson v. Mutual Life Ins. Co.*, 115 S.E. 14, 15 (Ga. 1922)).

79. *Id.* (citations omitted).

Thus the defendant insurance company's refusal to pay any amount over the cost to repair the vehicle was improper, not on grounds that the contract was ambiguous, but rather because the insurer's "primary obligation" was to pay for the loss that the insured car sustained.

The issue of an insurer's liability for the value of the vehicle after it elected to repair the damage arose in *Simmons v. State Farm Mutual Automobile Insurance Co.*⁸⁰ Simmons alleged that his car was damaged beyond repair, but the insurer only offered to pay the insured the amount of the lowest repair estimate, less the deductible.⁸¹ The court applied the "primary obligation" rule from *Corbett* to the policy language. The *Simmons* court determined that even though the defendant insurance company had options, the contract required "no matter which alternative is chosen, the market value of the property plus \$100 after payment must equal the market value before the loss."⁸² *Simmons* was the first in Georgia to stand for the principle that if the insurer elects to repair the damaged vehicle, it has to be capable of being repaired to the point that the market value of the car after the repair is the same as that before the accident.

The same appellate court that decided *Simmons* heard *State Farm Mutual Automobile Insurance Co. v. Smith*⁸³ in 1969. Smith's car was hit by a train and he eventually sold it as salvage for about twenty percent of its pre-accident value.⁸⁴ State Farm offered to pay Smith the cost of repair minus the deductible, but Smith argued for diminished market value.⁸⁵

The appellate court laid one more stone in the path leading up to *Mabry* when it went on to articulate the insurer's options under a policy such as the one at issue there. Under *Smith*, insurers had the following choices:

(1) To replace the property with other of like kind and quality less depreciation and deductible, (2) pay the loss in money (the loss being the difference in the market value measured immediately before and after the collision), less any deductible, or (3) if the insurer elects to repair it may do so, but to the extent that repairs do not restore to the market value immediately before the colli-

80. 143 S.E.2d 55 (Ga. Ct. App. 1965).

81. *Id.* at 57-58.

82. *Id.* at 57.

83. 167 S.E.2d 610 (Ga. Ct. App. 1969).

84. *Id.* at 611.

85. *Id.*

sion, the insurer is obligated to compensate for the difference, the total liability reduced by any deductible.⁸⁶

Finally, the *Smith* decision set Georgia apart from its sister jurisdictions when the court declared that "the insured must be made whole, except for any deductible, under any option."⁸⁷

In part, courts are hesitant to find insurers liable for diminished value damages because payment of such damages is usually demanded under the principle of making the plaintiff whole, which is the standard in torts and third-party insurance claims, not first-party claims on an insurance contract.⁸⁸ Despite the risqué nature of the court of appeals' holding in *Smith*, it denied rehearing just fourteen days later.⁸⁹

Nearly ten years later, another Georgia Court of Appeals heard *United States Fire Insurance Co. v. Welch*, a diminished value claim on an insurance policy very similar to that at issue in *Mabry*.⁹⁰ After the plaintiff's car was damaged, the "repairer would not guarantee the condition of the vehicle, only the parts replaced and the repairs actually made."⁹¹ The insurer argued that the insured "should be held to the literal terms of the policy that if the vehicle is repaired the insured must accept the cost of repairs even if it is less than the actual cash value of vehicle. [*sic*]"⁹² The court disagreed on the ground that the insurer had misconstrued the meaning or "repair" in the limit of liability provision as meaning any repair, whereas the court construed "repair to mean restoration of the vehicle to substantially the same condition and value as existed before the damage occurred."⁹³

B. The *Mabry* Decision

The final word on an insurance company's obligation to pay diminished value damages to its policyholders in Georgia came when two such policyholders brought a class action suit for breach of con-

86. *Id.*

87. *Id.* at 612.

88. See *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So. 2d 785, 788-89 (Ala. Civ. App. 2002). *Campbell v. Markel Am. Ins. Co.*, 822 So. 2d 617, 621-22 (La. Ct. App. 2001); *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473, 479 (La. Ct. App. 2001).

89. *Smith*, 167 S.E.2d at 612.

90. *U.S. Fire Ins. Co. v. Welch*, 294 S.E.2d 713, 713 (Ga. Ct. App. 1982) ("Appellee's automobile was insured by appellant insurer in a policy which provided collision coverage with a liability limit of the lesser of the actual cash value of the damaged vehicle or the amount necessary to repair or replace the vehicle, less \$200 deductible.").

91. *Id.* at 714.

92. *Id.*

93. *Id.*

tract against State Farm.⁹⁴ The plaintiffs alleged that State Farm failed to pay them part of the losses they sustained—namely that State Farm did not pay, or even tell them about, the diminution in value of their vehicles caused by the physical damage.⁹⁵ The complaint also called for injunctive relief based on State Farm's knowledge of its contractual obligations, avoiding the contractual obligations, failure to establish a procedure for handling diminished value claims, and failure to inform policyholders of such coverage or pay.⁹⁶ In December 2000, the trial court entered an order declaring that State Farm had to (1) pay diminished value claims; (2) evaluate the vehicle for diminished value when a loss is reported; and (3) either deny the presence of diminution in value or affirm and pay for it at the end of the adjustment and repair process. The court also issued an injunction ordering State Farm to develop and appropriate methodology and procedure to determine first-party physical damage claims for diminution in value.⁹⁷ The trial court certified a class consisting of insureds, whose State Farm policies were issued in Georgia, for declaratory and injunctive relief.⁹⁸ State Farm filed an appeal challenging the class certification and the order granting plaintiffs declaratory and injunctive relief.⁹⁹

The Georgia Supreme Court upheld the trial court's class certification.¹⁰⁰ Turning to the substantive merits of the case, the court framed the central issue in terms of "the scope of State Farm's contractual promise to compensate its policyholders for their losses."¹⁰¹ The policy language at issue was State Farm's promise to pay for the car's loss minus any deductible and the limit of liability provision limiting State Farm's "liability to the lower of the actual cash value of the vehicle or the cost of repair or replacement."¹⁰² Further, there was "a provision giving State Farm the right to settle a loss by paying up to the actual cash value of the car or paying 'to repair or replace the property or part with like kind and quality.'"¹⁰³ "That provision also require[d] that the policyholder pay for any 'betterment' resulting

94. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114, 116 (Ga. 2001).

95. *Id.* at 115–16.

96. *Id.*

97. *Id.* at 124.

98. *Id.*

99. *Id.*

100. *Id.* at 117.

101. *Id.* at 118.

102. *Id.*

103. *Id.*

from repair or replacement.”¹⁰⁴ To clarify what was at issue, the court noted that “[t]he conflict central to this case arises when State Farm determines that the vehicle is not a total loss and exercises its option to repair,”¹⁰⁵ because the concept of diminished value is a problem even when the car has been repaired perfectly.¹⁰⁶ In the declaratory judgment portion of the case, the trial court dealt with three issues: (1) whether the fact of physical damage diminishes the value of a vehicle, even if repairs return it to pre-loss appearance and function; (2) if so, whether State Farm’s policies obligate it to compensate insureds for that loss of value; and (3) if State Farm is obligated to pay the diminished value, whether it must assess that loss along with the other elements of physical damage when the insured makes a general claim of loss.¹⁰⁷ The court addressed each issue in turn, answering each in the affirmative and thus upholding the determinations of the trial court on all counts.¹⁰⁸

As to the first issue, State Farm argued that the diminished value of the vehicle is an issue only when the vehicle is assessed as a total loss or “when repairs cannot return the vehicle to its pre-loss condition in terms of appearance and function.”¹⁰⁹ Further, State Farm argued against a diminution in value and in the alternative, if there was such a diminution in value, it would not be realized until the vehicle’s sale.¹¹⁰ Finally, State Farm “denie[d] any duty to assess vehicles for diminution in value unless the insured specifically makes a claim, separate from the original claim of loss, that the vehicle has lost value even though the physical damage to it was repaired.”¹¹¹ The trial court had found potential for diminution in value in every loss, even when the vehicle is properly repaired.¹¹² In reaching that factual finding, the court “acknowledged that there is a common perception that a wrecked vehicle is worth less simply because it has been wrecked” and that “a potential for diminution in value exists in every automobile accident.”¹¹³ The supreme court affirmed the trial court in regards to the first issue.¹¹⁴

104. *Id.*

105. *Id.* at 119.

106. *Id.*

107. *Id.*

108. *Id.* at 119–23.

109. *Id.* at 119.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

The second issue in the declaratory relief portion of the case was whether State Farm would be “required to pay for diminution in value as part of its physical damage coverage.”¹¹⁵ State Farm argued that the policy language only obligated it to pay for repairs that would return the car to its pre-loss condition if it chose the repair option.¹¹⁶ In response to State Farm’s assertion, the supreme court determined that “value, not condition, is the baseline for the measure of damages . . . and that a limitation of liability provision affording the insurer an option to repair serves only to abate, not eliminate, the insurer’s liability for the difference between the pre-loss value and post-loss value.”¹¹⁷

As to the last issue in the declaratory relief portion of the appeal, having answered the first two questions in the affirmative, the court turned to whether “State Farm is required to assess for diminution in value without a specific claim for that element of loss.”¹¹⁸ The supreme court easily disposed of the issue by stating that

[n]othing in the insurance policy requires the insured to assert a right to recover any particular element of damage. If the policy does not require the insured to claim separately such items as damage to tires or damage to bodywork, it stands to reason that the policy does not require a separate claim for diminution in value.¹¹⁹

Having determined that diminished value is an element of loss even when the vehicle is repaired, that State Farm is obligated to pay the diminished value losses sustained by its policyholders, and that it must assess diminished value loss along with the other elements of physical damage, the court turned to the trial court’s grant of injunctive relief.¹²⁰

The supreme court affirmed the trial court, holding that the trial court did not abuse its discretion.¹²¹ The trial court had ordered State Farm to “develop an appropriate methodology for making such evaluations; to collect, catalog, and maintain any information necessary to determine the amount of any diminution in value; and to report to the court the manner in which it was complying with the injunction.”¹²² The evidence showed that State Farm had no method of assessing diminished value, so the trial court did not abuse its discretion

115. *Id.*

116. *Id.*

117. *Id.* at 121.

118. *Id.* at 123.

119. *Id.*

120. *Id.*

121. *Id.* at 124.

122. *Id.*

by permitting State Farm to develop its own compliance methodology.¹²³

Mabry is the definitive authority on automobile insurers' obligations to pay and assess diminished value damages for their policyholders in Georgia. The injunction requiring State Farm to collect data on diminution in value, to evaluate all first party claims, and to pay for diminution in value as they would any other element of loss permanently made Georgia the leader in this area of law.

C. The Aftermath of *Mabry*

After the *Mabry* opinion unquestionably established the obligation of Georgia insurers to compensate their policyholders for the diminished value of their repaired vehicles, other plaintiffs sought to apply that holding to their claims of loss. In *Scott v. Cincinnati Insurance Co.*,¹²⁴ the plaintiff's car was in an accident in July 2001, five months before *Mabry* was announced.¹²⁵ The defendant insurance company paid to repair Scott's car, but then in May 2002, plaintiff filed an action relying on *Mabry*, for her car's inherent diminished value damages.¹²⁶ The insurance company initially denied all material allegations, including that there was any such thing as inherent diminished value.¹²⁷ In its motion to dismiss, the insurance company conceded that in light of *Mabry*, diminished value is a covered loss, but it argued that, under the contract the plaintiff was obligated to have an appraiser evaluate the damages prior to filing a court action.¹²⁸ The court found that the appraiser clause was valid and enforceable, and that it applied to plaintiff's claim for diminished value.¹²⁹ Thus, according to the terms of her insurance policy, Scott was required to submit the issue of diminished value to an appraiser according to the contract.¹³⁰ The court retained jurisdiction over the case.¹³¹ The *Scott* case shows that defendant insurance companies will still generally deny all allegations of diminished value, but this case may be indica-

123. *Id.*

124. No. 2002-CV-53545, 2003 WL 25507755 (Ga. Super. Ct. Feb. 24, 2003) (order staying case and denying defendant's motion to dismiss).

125. *Id.* at *1.

126. *Id.*

127. *Id.*

128. *Id.* at *2.

129. *Id.* at *2-3.

130. *Id.*

131. *Id.* at *4.

tive of the trend for the insurance companies to eventually concede that diminished value is a covered loss in Georgia.

In *Nuco Investments, Inc. v. Hartford Fire Insurance Co.*,¹³² the plaintiff owned a Days Inn property insured by defendant insurance company.¹³³ Hartford refused to pay the mold damage claim on the ground that an express exclusion for mold damage was inadvertently omitted from the policy on two separate occasions.¹³⁴ Nuco sued for a declaration of coverage and for breach of contract. The policy stated that “[i]n case of loss the basis of adjustment unless otherwise endorsed herein shall be as follow[s]: Buildings . . . at replacement cost at the time and place of loss, if replaced, otherwise Actual Cash Value.”¹³⁵ One issue was whether the measure of “replacement cost” included diminution of value.¹³⁶

In analyzing whether replacement cost includes diminution of value, the *Nuco* court relied on *Mabry* to show that “value, not condition, is the baseline for the measure of damages in a claim under an automobile insurance policy in which the insurer undertakes to pay for the insured’s loss from a covered event.”¹³⁷ The court said that the rationale of the prior Georgia cases “remains solid” and that “recognition of diminution in value as an element of loss to be recovered on the same basis as other elements of loss merely reflects economic reality.”¹³⁸ To explain why *Mabry* is applicable to the case at hand, the court noted that “the Georgia Supreme Court was concerned not with the type of property insured, but with the measure of damages that an insurer is obligated to pay when a policy provides for replacement cost.”¹³⁹ The *Nuco* court went on to explain that “[t]he decision in *Mabry* focused on the economic reality of ‘loss,’” and that “[d]iminution of value is an element of ‘replacement cost.’” The court stated that “[t]here is no authority in Georgia to indicate that this element of loss is not ‘direct loss or damage.’”¹⁴⁰ The *Nuco* case is remarkable in that it extends the central holding of *Mabry* to other types of insurance policies—not just car insurance. In their unre-

132. No. 1:02 CV 1622 CAP, 2005 WL 3307089 (N.D. Ga. Dec. 5, 2005) (order denying in part and granting in part defendant’s motion for summary judgment).

133. *Id.* at *1.

134. *Id.*

135. *Id.* at *3.

136. *Id.*

137. *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114, 121 (Ga. 2001)).

138. *Id.* (quoting *Mabry*, 556 S.E.2d at 122).

139. *Id.* at *4.

140. *Id.*

ported opinion, the *Nuco* court extended *Mabry* to an insurance policy covering property damage due to mold.¹⁴¹ That the opinion is unreported may indicate that while *Mabry* is soundly reasoned and accepted as the definitive word on diminished value in automobile insurance, courts are unwilling to broadly extend its holding to other types of insurance claims, save for on a case-by-case basis as justice demands.

Finally, in *City of Atlanta v. Broadnax*,¹⁴² the plaintiff property owner sued the city for nuisance due to recurrent flooding of her property due to the city's drainage system. Broadnax argued that *Mabry* supported her claim for diminution in value, in addition to the cost of repair.¹⁴³ The court declined to extend *Mabry* and instead used the rule articulated in another Georgia case that addressed the diminished value of real property as the controlling rule for nuisance actions.¹⁴⁴ *Broadnax* demonstrates that *Mabry* may not have application outside the automobile insurance context, and in conjunction with *Nuco*, any extension of *Mabry*'s holding beyond automobile insurance cases will likely remain unreported and on a case-by-case basis. Thus, there should be no concern that the *Mabry* rule will permanently seep into the analysis of diminished value outside the automobile insurance context.

IV. Why Georgia Has It Right

A. Basic Contract Interpretation

The obligation of an automobile insurer to pay the diminished value of a repaired vehicle has been heavily litigated in recent years.¹⁴⁵ In analyzing the issue, the various opinions focus mainly on whether the policy is ambiguous, thus implicating the doctrine of contra proferentem, and whether the insured plaintiff's expectations were reasonable and therefore should be effectuated under the doctrine of

141. *See id.*

142. 646 S.E.2d 279 (Ga. Ct. App. 2007).

143. *Id.* at 287.

144. *See id.*

145. *See, e.g.,* Pritchett v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 785, 788–89 (Ala. Civ. App. 2002); O'Brien v. Progressive N. Ins. Co., 785 A.2d 281 (Del. 2001); Campbell v. Markel Am. Ins. Co., 822 So. 2d 617, 618–19 (La. Ct. App. 2001); Townsend v. State Farm Mut. Auto. Ins. Co., 793 So. 2d 473, 473 (La. Ct. App. 2001); Camden v. State Farm Mut. Auto. Ins. Co., 66 S.W.3d 78 (Mo. Ct. App. 2001); Am. Mfrs. Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 158, 162 (Tex. 2003); *see also* Farrish, *supra* note 3; discussion *supra* Part II.

reasonable expectations.¹⁴⁶ To a lesser extent, courts have considered the public policy limitation on the freedom of contract as a basis for finding coverage for diminished value, which will be discussed in Part IV B.¹⁴⁷ Each mode of analysis leads to a quagmire: for every argument a plaintiff advances, the defendant has a nearly equally effective counter-argument. In a state that does not have strong, reliable precedent for determination of the issue, adjudicating the matter requires analyzing conflicting adjudications of the same issue based on substantially similar policy language. The most recent cases make frequent references to each other, which illustrates that the resolution of the issue of diminished value damages in automobile insurance may have become an exercise in monocular thinking: a court essentially picks a side and adopts the reasoning of those cases in toto, without independent analysis. This Part discusses the various arguments that litigants have made with regard to the doctrine of *contra proferentem* and the doctrine of reasonable expectations, and shows how *Mabry* rises above the quagmire.

1. *Contra Proferentem*

Contra proferentem applies when a contract term is ambiguous.¹⁴⁸ The arguments about whether an insurance policy is ambiguous have centered around three terms: loss, repair, and repair as modified by the limit of liability clause.

Diminished value plaintiffs have argued the undefined word “loss” in the policy is ambiguous.¹⁴⁹ Defendant insurance companies have disputed that diminished value of a repaired vehicle is a loss in the first place, but rather is just a “market perception”¹⁵⁰ that would not even be realized unless and until the vehicle is sold.¹⁵¹ The *Mabry* court recognized a common perception that once a car has been in an accident and repaired mechanically, it is still perceived to have less value than an identical car that has not been in an accident.¹⁵² Loss of value is a direct loss to the vehicle because no intervening force caused it—the difference in value is directly attributable to the fact of

146. For example, see discussion *supra* Part II, especially *Townsend*, 793 So. 2d at 480 (holding that the policy was ambiguous). See also *O'Brien*, 785 A.2d at 288–89 (holding that the policy was unambiguous); *Camden*, 66 S.W.3d at 81 (same).

147. See, e.g., discussion *supra* Part II.

148. *Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222, 1224 (Colo. App. 2000).

149. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001).

150. *Am. Mut. Auto. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 159 (Tex. 2003).

151. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114, 119 (Ga. 2001).

152. *Id.*

the accident. Loss of value is an accidental loss to the vehicle because the collision was an "accident" in the first place. Therefore, the loss in value is a direct and accidental loss to the vehicle. In *Mabry*, it was State Farm's own evidence that helped the court determine that diminished value is a loss.¹⁵³ Instead of focusing on the ambiguity of the word loss, the *Mabry* court took a common-sense approach to declare that diminished value is a loss in the ordinary sense of the word and then went on to discuss the more hotly debated issues.

Plaintiffs have argued that the word "repair" is ambiguous in that it can mean to fix—which does not implicate value—or to restore, which arguably implicates value.¹⁵⁴ Since the word "repair" is often not defined in the plaintiff's insurance contract, the ambiguity in meaning should be resolved against the insurer via operation of contra proferentem. Defendants counter with the rule that when interpreting the language of an insurance policy, the court must give the words used in the policy "their customary and normal meaning," and the court must construe the policy in a manner consistent with the interpretation that an ordinary person would place on the policy's language.¹⁵⁵ Under that analysis, "the generally prevailing meaning of 'repair' is 'to fix anything that is broken,'" which "does not encompass restoration of value, an item of damage that cannot be physically repaired."¹⁵⁶ Thus, an ordinary person would not interpret the insurer's promise to pay for repairs to a vehicle to include payment for some perceived loss of resale value as well. If the word "repair" is assigned its commonly understood meaning, the defendant insurance companies argue there is no ambiguity in the policy and diminished value damages are not covered.

In response, a plaintiff could counter that "[w]ords and phrases used in a policy are to be construed using their plain, ordinary, and generally prevailing meaning, unless the words have acquired a technical meaning."¹⁵⁷ Further, the Restatement (Second) of Contracts states that "[u]nless a different intention is manifested, . . . technical terms and words of art are to be given their technical meaning when used in a transaction within their technical field."¹⁵⁸ One such techni-

153. *Id.*

154. *Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222, 1225 (Colo. App. 2000).

155. *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So. 2d 785, 791 (Ala. Civ. App. 2002).

156. *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473, 478 (La. Ct. App. 2001).

157. *Id.* at 476.

158. RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

cal meaning was adopted by the Colorado Court of Appeals in *Hyden v. Farmers Insurance Exchange*, which construed the term “repair” to include market value according to the commentator *Couch on Insurance*.¹⁵⁹ The *Mabry* decision avoids the fight over whether repair is ambiguous by giving the word a common sense meaning: “[w]e construe repair to mean restoration of the vehicle to substantially the same condition and value as existed before the damage occurred.”¹⁶⁰ By assigning that definition of repair, the Georgia Supreme Court not only resolved the issue for the parties before them—it also assigned a reasonable meaning to the word repair. Defendant insurance companies have argued that “[a] mere split in the case law concerning the meaning of a term does not render that term ambiguous.”¹⁶¹ However, a split in case law regarding the meaning of a word can be *evidence of* ambiguity, even if it does not alone render the term ambiguous, because the judges who write the opinions are reasonable people and reasonable people can differ as to the meaning of a term. The meanings assigned by *Couch on Insurance* meaning of repair adopted in *Hyden*¹⁶² and the “‘fix anything that is broken’” meaning assigned to it by *Townsend*,¹⁶³ render the term “repair” “susceptible of more than one reasonable meaning.”¹⁶⁴ As such, “repair” should be construed against the insurer via operation of *contra proferentem*.¹⁶⁵

Even if the word “repair” itself is not considered ambiguous, plaintiffs have argued that the phrase “repair” as modified by “of like kind and quality” in the limit of liability provision of the policy is ambiguous because that section fails to specify the protections afforded in the policy.¹⁶⁶ The phrase could reasonably mean that the insurance company will “restore to the insured a vehicle in a similar condition in appearance and function”; or it could also reasonably mean that the insurance company will “restore to the insured a vehicle in a similar condition in appearance, function *and* value.”¹⁶⁷ The definition of “like” carries notions of equivalence of value or quality.¹⁶⁸ “‘Quality’ is

159. *Hyden*, 20 P.3d at 1225.

160. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114, 121 (Ga. 2001).

161. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001).

162. *See Hyden*, 20 P.3d at 1225.

163. *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473, 478 (La. Ct. App. 2001).

164. *Hyden*, 20 P.3d at 1224.

165. *Id.*

166. *Id.* at 1225.

167. *Allgood v. Meridian Sec. Ins. Co.*, 807 N.E.2d 131, 136 (Ind. App. 2004).

168. *Id.*

defined as 'degree or grade of excellence.'¹⁶⁹ "'Kind' is defined as 'fundamental, underlying character as a determinant of the class to which a thing belongs.'¹⁷⁰ The phrase "of like kind and quality" therefore includes the concept of value.¹⁷¹ Even with repairs, plaintiffs' cars can be worth thousands of dollars less than before the accident, so their cars were not repaired to a "like kind or quality" because the cars lost so much value.

Defendants typically respond that the term "repair" as modified by "of like kind and quality" is not reasonably susceptible to the alternate meaning proffered by the plaintiff, since that meaning would render the limit of liability clause meaningless.¹⁷² "When construing the policy's language, [the court] must give effect to all contractual provisions so that none will be rendered meaningless."¹⁷³ The argument made by defendant insurance companies rests on the assumption that the cash value of the car and the cost of repair plus diminished value damages will always be the same figure, thus rendering meaningless the insurer's choice of paying the lesser of the two. However, a defendant's assumption can be refuted with a simple hypothetical, as put forth by the court in *Allgood*:

It would be the rare case in which the value of a vehicle after a collision and subsequent repair would exactly equal the cost of repair. Say, for example, a vehicle is worth \$7,000 prior to a collision. After the collision, returning the vehicle to its pre-collision condition would require repairs to the vehicle costing \$4,000, and the vehicle would then be worth \$6,000. The actual cash value under the "replace" option would require the insurer to pay \$7,000. Repair plus a payment for diminution in value would require a payout of \$5,000[,], \$4,000 for repair, plus \$1,000 for the diminished value of the vehicle.¹⁷⁴

Plaintiffs can argue that since it is not true that in every situation the cash value and the cost of repair plus diminished value damages are always the same figure, then the meaning of "repair," as modified by "of like kind or quality," which connotes value, is one to which the contract is reasonably susceptible and therefore the contract is ambiguous and should be construed against the insurer. To refute, a defendant could point out that the hypothetical laid out in *Allgood* "neglects

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* Am. Mfrs. Mut. Auto. Ins. Co. v. Schaefer, 124 S.W.3d 154, 157 (Tex. 2003).

173. *Id.*

174. *Allgood*, 807 N.E.2d at 137. Although the Indiana Supreme Court overturned *Allgood*, its opinion said nothing to refute the accuracy of this hypothetical. *Id.*

the fact that, had the insurer chosen the 'replace' option, it would have been entitled to take the vehicle as salvage,"¹⁷⁵ so that the cost to replace minus salvage is the same as cost to repair plus diminished value. However, adding the salvage value of a damaged vehicle to the calculation may not always make the replace option the same as the repair option because of market imperfections.¹⁷⁶ In other words, the *Allgood* hypothetical was correct if salvage value is lower than it should be because of market irrationality.

As the preceding debate shows, consumers and courts alike do not understand the variables in the diminished value equation, so instead of focusing on contract construction, the *Mabry* court looked to economics, public policy, and precedent from *Corbett*. The decisions in the diminished value cases from other jurisdictions that were decided shortly before *Mabry* denied such coverage in large part because of the argument that awarding diminished value would negate the insurer's choice to repair or replace, as laid out in the limit of liability.¹⁷⁷ The beauty of the *Mabry* decision is that it did not fall into the logical pitfall regarding whether the limit of liability clause would retain meaning if diminished value was awarded, most likely because there is no answer: on one hand, it is not true that in *every* instance payment of diminished value plus cost to repair equals cost to replace plus salvage (if the insurer has salvage rights under the contract), because it is entirely possible that there is one instance where there is a lesser cost and therefore the defendant's argument, framed in absolute terms, must fail. On the other hand, it is fairly clear that payment of diminished value in addition to the cost to repair will often be a sum that is very close to the amount of cost to replace minus salvage, so the insurer still retains a choice, albeit a less meaningful one. *Mabry* avoided the question by holding that the limit of liability provision is subordinate to the primary obligation to pay for the insured's loss, which is a public policy decision, as will be discussed in section B of Part IV.

2. Reasonable Expectations

"The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will

175. Farrish, *supra* note 3, at 60.

176. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 797 (3d Cir. 1994) (recognizing that "the market sometimes fails").

177. See, e.g., *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So. 2d 785, 795 (Ala. Civ. App. 2002); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 291 (Del. 2001).

be honored even though painstaking study of the policy provisions would have negated those expectations.”¹⁷⁸ One commentator has argued that “the Georgia cases leading up to and including *Mabry* are fundamentally reasonable expectations cases.”¹⁷⁹ That argument is supported by the statement in *Mabry* that “the insurance policy, drafted by the insurer, promises to pay for the insured’s loss; what is lost when physical damage occurs is both utility and value; therefore, the insurer’s obligation to pay for the loss includes paying for any lost value.”¹⁸⁰ Most people are aware that the diminished value of a repaired vehicle is a loss, as evidenced by the presence of companies like CarFax and Kelley Blue Book, which help consumers ensure that they are not paying too much for vehicles that have been in a wreck. If an insured bothered to look at the policy language that promises to pay for “loss to your car,”¹⁸¹ and the insured is aware that the car has sustained a loss in value due to the accident, it would be objectively reasonable for the insured to believe that the diminished value of the vehicle is a covered loss. Further, it is possible for a court to find coverage “even when the applicable exclusion or limitation is clear and unambiguous.”¹⁸² The policy may be unambiguous to a judge who has the aid of amicus briefs from the insurance lobby, but for the average consumer, the limit of liability does not negate an expectation of coverage for a loss.

The doctrine of reasonable expectations “suggests that an insured can have reasonable expectations of coverage that arise from some source *other* than the policy language itself, and that such an extrinsic expectation can be powerful enough to override any policy provisions no matter how clear.”¹⁸³ The marketing strategies of many of the larger auto insurers fuel consumer expectations of greater coverage.¹⁸⁴ For example, several years ago, Farmers Insurance ran a television advertisement that showed a couple taking a picture in front of a red convertible on a cliff above the ocean. When the man leaned on the car to pose for the picture, the car rolled off of the cliff. The whole scene was then played in reverse, and the voiceover told con-

178. Keeton, *supra* note 7, at 963–67.

179. Farrish, *supra* note 3, at 57.

180. State Farm Mut. Auto. Ins. Co. v. Mabry, 556 S.E.2d 114, 122 (Ga. 2001).

181. *Id.* at 118.

182. Farrish, *supra* note 3, at 46.

183. *Id.* at 46–47.

184. See Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1404–05 (1994).

sumers that Farmers would “make it like it never happened.”¹⁸⁵ Farmers Insurance now promises that it “get[s you] back where you belong.”¹⁸⁶ “The insurance industry, and these companies in particular, are among the largest volume advertisers in the United States.”¹⁸⁷ However, “[i]nsurance companies tell two different sets of stories at two distinct points in the insurance relationship.”¹⁸⁸ “When selling insurance, companies address the dependent nature of the relationship, palliating the fears that dependency arouses in prospective insureds. When paying claims, on the other hand, insurance companies stress the need to balance and limit overreaching.”¹⁸⁹ The court’s role is “to enforce insurance companies’ promises (including, of course, defining the scope of these promises).”¹⁹⁰ After the *Mabry* decision, the Indiana Court of Appeals addressed the *Hyden* case to bolster its decision that diminished value losses were payable to the plaintiff in the case at bar. It stated that

[n]o reasonable insured would read a policy containing a limit of liability provision like that in *Hyden* . . . and assume that, if he were involved in a collision and turned to his insurer to cover the loss, he might be left with only one-third of what he had before the collision.¹⁹¹

There the court was effectuating the reasonable expectation of the insured, just as the *Hyden* court had done for the insured plaintiff in that case. Perhaps it was the language of the policy alone that drove the Indiana Court of Appeals, but since “[m]ost people can recite a few of the more salient insurance advertising slogans,”¹⁹² it is entirely possible that the insurance company’s sales stories were an undercurrent to the determination that diminished value was payable.

“Judges are to determine these ‘objectively’ reasonable expectations, not through fact-finding, but through the exercise of a consid-

185. *Ocean* (Farmers Insurance Exchange television commercial) (on file with Farmers Insurance Group).

186. Farmers Insurance, Retail/Service Insurance Coverages, http://www.farmers.com/FarmComm/retail_service_insurance.html (last visited Jan. 4, 2009); Farmers Insurance, Driving Safety, http://www.farmers.com/FarmComm/driving_safety.html (last visited Jan. 4, 2009).

187. Baker, *supra* note 184, at 1404.

188. *Id.* at 1397.

189. *Id.* at 1403.

190. *Id.* at 1401.

191. *Allgood v. Meridian Sec. Ins. Co.*, 807 N.E.2d 131, 137 (Ind. Ct. App. 2004). Although *Allgood* was overturned by the Indiana Supreme Court, the case demonstrates how courts have awarded diminished value damages based on the reasonable expectations of the insured. *Id.*

192. Baker, *supra* note 184, at 1403.

ered judgment.”¹⁹³ The *Mabry* court’s holding that “State Farm is obligated to pay for diminution in value when it occurs [was] based in reason, precedent, and the intent of the parties.”¹⁹⁴ Thus, through the lens of the doctrine of reasonable expectations, the Georgia Supreme Court decided the case correctly.

B. Public Policy

“Parties to an insurance contract are free to agree upon any terms so long as that agreement is not inconsistent with . . . public policy.”¹⁹⁵ “[P]ublic policy requires insurers to disclose fully and fairly to insureds what insurance protection is being provided for the premium charged.”¹⁹⁶ Some auto insurance companies charge a much higher premium for coverage than other insurance companies, yet it is unclear that the company actually provides more coverage. Since insurance policies are usually contracts of adhesion,¹⁹⁷ consumers only have indirect bargaining power in that they are “free agents”¹⁹⁸ and can shop around for an insurance policy that seems to best fit their needs, but are “left little choice beyond electing among standardized provisions offered.”¹⁹⁹ It is incumbent on an insurer to provide services commensurate with the fee charged, or be very explicit in the policy language so that a potential customer knows exactly what he or she is purchasing. Insurance companies do not want the courts to rewrite their policies and expand coverage. The insureds are entitled to protection by that same rule, so courts should not rewrite insurance policies to exclude coverage either.

“Insurance is a means by which individuals and organizations share the risk of misfortune. We each pay a little (sometimes not so little) so that there will be money to pay for the losses of the unfortunate few.”²⁰⁰ Even in today’s sluggish economy, insurance companies are raking in record profits.²⁰¹ While profitability of corporations is a

193. *Id.* at 1421.

194. *State Farm Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114, 122 (Ga. 2001).

195. *O’Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

196. *Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222, 1225 (Colo. App. 2000).

197. *Farrish*, *supra* note 3, at 45.

198. *Baker*, *supra* note 184, at 1402.

199. *Keeton*, *supra* note 7, at 966.

200. *Baker*, *supra* note 184, at 1400–01.

201. “2005 profits are up 18.7 percent over last year’s profit of 38.7 billion; 2004 had been the record until 2005.” Posting of Cyrus Dugger to Tort Deform, 2005 Was the Most Profitable Year Ever for the Insurance Industry, http://www.tortdeform.com/archives/2006/10/2005_was_the_most_profitable_y.html. (Oct. 6, 2006, 16:11 EST).

valid societal goal, it should not come by way of individuals bearing the cost of a loss that should be validly covered by insurance.

Insurance policies are almost always contracts of adhesion, where one party has far greater bargaining power and the terms of the contract are not up for negotiation.²⁰² The idea that parties to an insurance contract can agree upon whatever terms they choose, so long as those terms comport with public policy, is somewhat illusory: the insured can only agree with the terms that the insurance company lays out or take his business elsewhere—there is no dickering over terms by parties with relatively equal bargaining power. An individual's only potential bargaining power is the ability to walk out the door and seek coverage by another insurer.

If no insurers cover diminished value, then it falls to the individual insureds to bear the cost of the loss of value to the car after an accident. If an insured possesses a repaired vehicle, minus the amount of the diminution in value, then it is more difficult for him or her to sell that used car and purchase another because the vehicle was probably purchased on credit and is now worth far less than what is owed on the loan. In this way, leaving individual insureds to bear the cost of the loss in value has a direct and negative effect on commerce—for car manufacturers, car dealers, and the consumer who has less purchasing power in the free market. If consumers are forced to keep their old cars that are worth far less than the resale value, those consumers are not in a position to purchase a new vehicle. Thus if diminished value were a covered loss, car manufacturers would sell more new cars because then consumers could sell their old cars and buy new ones. Car dealers that sell new cars would similarly benefit from coverage for diminished value because, like auto manufacturers, if consumers are able to sell their repaired vehicles and pay off the existing loan, more consumers will be in a position to purchase a new vehicle. Used car dealers would get more business if diminished value were a covered loss because more used cars would be circulated through the market. If diminished value were a covered loss, individual consumers who have sustained the misfortune of a car accident will be more able to participate in the free market. All insurers would have to do is raise premiums to offset the payouts on diminished value claims, or insurers could offer diminished value coverage as a separate product. If the cost of the loss in value is allocated to insurers, there will be a drop in the insurance companies' profits, but not to the point that they be-

202. Farrish, *supra* note 3, at 45.

come unprofitable²⁰³ and society as a whole will receive the benefits for which insurance was created in the first place: spreading risk among society so as to alleviate the impact on the individual. Thus, the Georgia Supreme Court was correct in ordering State Farm to cover diminished value losses as a matter of public policy.

Conclusion

"Insurance is the real safety net for middle America."²⁰⁴ Consumers depend on their insurers to uphold the promise to be there when disaster strikes.²⁰⁵ Since insurance policies are contracts of adhesion,²⁰⁶ the consumer only has indirect bargaining power in the form of comparison shopping. If the terms of insurance policies are unclear, consumers cannot know what product they are actually purchasing. If the terms of the policy are ambiguous, the doctrine of contra proferentem will operate to construe the policy against the insurer who drafted it.²⁰⁷ However, determining whether a contract term is ambiguous comes at a great expense in terms of litigation costs and judicial resources. The *Mabry* court chose to rise above the endless bickering over ambiguity²⁰⁸ by assigning a definition of "repair" that reflects the economic reality of the diminished value of repaired vehicles.²⁰⁹ The court used the reasonable expectations of the insured to find coverage because diminished value is a loss and the policy promised to "pay for loss to your car," which was a simple, straightforward application of the rule. As a matter of public policy, the court recognized the economic reality of diminished value and the propriety of placing the cost of that loss on the insurer. As other jurisdictions face this recurring issue in the future, the insurance lobby will likely steer the outcome of the litigation towards denial of coverage. The Georgia

203. "In Georgia, where the state Supreme Court recently upheld coverage for diminished value, the State Farm and Allstate Insurance Companies alone calculate their resultant losses at \$209 million." *Id.* at 41. In 2007, however, State Farm's annual report indicated that the company's net income for the year was \$3.664 billion, up \$687 million from the 2006 net income of \$2.977 billion. STATE FARM MUT. AUTO. INS. CO., 2007 ANNUAL REPORT 1 (2007), available at http://www.statefarm.com/_pdf/2007annualreport.pdf.

204. Baker, *supra* note 184, at 1407.

205. *Id.* at 1402.

206. Farrish, *supra* note 3, at 45.

207. See Hyden v. Farmers Ins. Exch., 20 P.3d 1222, 1224 (Colo. App. 2000).

208. See discussion *supra* Part III.

209. State Farm Mut. Auto. Ins. Co. v. Mabry, 556 S.E.2d 114, 122 (Ga. 2001).

Supreme Court should be commended for its sensible analysis of the economic quandary that is diminished value and its ability to rise above pressure from the insurance lobby.

